81-2262
No.

Office - Supreme Court, U.S.
FILED
MAY 13 1982
ALEXANDER L. STEVAS
CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BILL C. SUTTON, ET AL
and
SUN FRESH FARMS OF LOUISIANA,
PARTNERSHIP, ET AL

Petitioner,

v.

SOUTHERN NATURAL GAS COMPANY

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

BOBBY L. CULPEPPER
ATTORNEY AT LAW
525 EAST COURT AVENUE
JONESBORO, LOUISIANA 71251
(318) 259-4184

Attorney for Petitioner

QUESTION PRESENTED

Why should this writ be granted as a matter of law and a matter of equity to reverse the findings of the Louisiana Supreme Court in that the Louisiana Supreme Court erred in not ruling that LSA-R.S. 30:22 and LSA-R.S. 19:2 are unconstitutional in that these two statutes are in violation of Amendment V of the United States Constitution; in violation of Amendment XIV, Section 1 of the United States Constitution; these two statutes are in violation of the United States Constitution in that they deprive a person of property, without due process of law, in that they allow one person, being a Commissioner of Conservation, to take private property and in the taking of private property not allow just compensation to the property owners?

TABLE OF CONTENTS

	Page
Question Presented	i
Petition for Writ of Certiorari	1
Opinion Below	2
Jurisdiction	2
United States Constitutional Provisions Involved	3
United States Code Annotated Rules Involved	5
Louisiana Constitutional Provisions Involved	6
Louisiana Statutes Involved	7
Statement of the Case	12
Reasons For Granting the Writ	14
Conclusion	30
Certificate	31
Appendix: Louisiana Supreme Court Denials	Exhibit "A"
Louisiana Court of Appeal Decisions, Second Circuit	Exhibit "B"

TABLE OF CASES

Page

State v. Green GMC Van, 354 So.2d 354 22

Statutes and Rules Cited

United States Constitution, Fifth Amendment..... i,2,4,15,21,25,30

United States Constitution, Fourteenth Amendment, Section 1 ...i,2,4,15,22,25,30

United States Constitution, Article 6, (Cl-2)..... 3

United States Constitution, Article 3, Section 2 3

Rule 28 U.S.C. 1257(3)..... 5

Rule 42 U.S.C. 1983 5

Louisiana Constitution 1974 Article 1, Section 4 ... 6,21,22,24,25,29

Louisiana Revised Statutes 30:22 ..... i,7,15,21,22,23,26,29

Louisiana Revised Statutes 19:2 .....i,9,15,17,21,23,26,29

Louisiana Revised Statutes 45:251 11,20

Louisiana Revised Statutes 30:721-30:723 11,20

Louisiana Revised Statutes 19:9..... 27

Louisiana Revised Statutes 30:33(B).... 28

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BILL C. SUTTON, ET AL
and
SUN FRESH FARMS OF LOUISIANA,
PARTNERSHIP, ET AL

Petitioner,

V.

SOUTHERN NATURAL GAS COMPANY

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND TO THE
COURT OF APPEAL, SECOND CIRCUIT,
STATE OF LOUISIANA

Petitioner, Bill C. Sutton, et al, and Sun Fresh Farms of Louisiana, Partnership, et al, respectfully pray that a Writ of Certiorari issue of review the final order of the Supreme Court for the State of Louisiana entered herein on February 19, 1982, and to review the judgment and

opinion of the Court of Appeal, Second Circuit, entered on November 2, 1981; Application for Rehearing was filed by the petitioners and on December 10, 1981, the Application for Rehearing was denied by the Honorable Second Circuit Court of Appeal.

OPINION BELOW

The order of the Supreme Court of the State of Louisiana was accomplished by a notice of "Writ Denied. Dixon, C. J. and Watson, J., would grant only as to attorney's fees issue" dated February 19, 1982, as hereto attached at page . The opinion of the Court of Appeal is found at 406 So.2d 657 and 406 So.2d 669, said copy of decision located on page of these writs.

JURISDICTION

The jurisdiction of this court is invoked under the United States Constitution, Amendments V and XIV, and also invoked under

28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS and RULES INVOLVED

CONSTITUTIONAL PROVISIONS:

Article 3, Section 2,
United States Constitution:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

Article 6, (Cl. 2)
United States Constitution:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby. Anything in the Constitution or Laws of any State to the contrary notwithstanding."

Amendment 5
United States Constitution:

"...no person shall be...deprived of life, liberty, or property, without due process of law; ...nor shall private property be taken for public use, without just compensation."

Amendment 14, Section 1
United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

RULES:

28 U.S.C. 1257 (3)

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or where any title, right, privileges or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or a commission held, or authority exercised under the United States."

42 U.S.C. 1983

"Every person who, under color of any statute, ordinance, regulation, custom or

usage of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law; suit, and equity, or other procedure for redress."

LOUISIANA CONSTITUTIONAL PROVISIONS:

Article 1, Section 4,
Louisiana Constitution of 1974

"...Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question..."

LOUISIANA STATUTES:

LSA-R.S. 30:22

"...C. The commissioner shall determine with respect to any such underground reservoir proposed to be used as a storage reservoir, whether or not such reservoir is fully depleted or the original commercially recoverable natural gas and condensate content therein. If the commissioner finds that such reservoir has not been fully depleted, the commissioner shall determine the amount of the remaining commercially recoverable natural gas and condensate content of such reservoir.

D. The commissioner may issue any necessary order providing that all natural gas which has previously been reduced to possession, and which is subsequently injected into an underground storage reservoir shall be all times be deemed the property of the injector, his successors and assigns; and in no event shall such gas be subject to the right of

the owner of the surface of the lands or of any mineral interest therein under which such underground storage reservoir shall lie or be adjacent to or of any person than the injector, his successors and assigns, to produce, take, reduce to possession waste or otherwise interfere with or exercise any control thereover; provided that the injector, his successors and assigns, shall have no right to gas in any stratum or portion thereof not determined by the commissioner to constitute an approved underground storage reservoir. The commissioner shall issue such orders, rules and regulations as may be necessary for the purpose of protecting any such underground storage reservoir, strata or formations against pollution or against the escape of natural gas therefrom, including such necessary rules and regulations as may pertain to the drilling into or through such underground storage reservoir."

LSA-R.S. 19:2

"Where a price cannot be agreed upon with the owner, any of the following may expropriate needed property:

(1) The state or its political corporations or subdivisions created for the purpose of exercising any state government powers;

(2) Any domestic or foreign corporation created for the construction of railroads, toll roads, or navigation canals;

(3) Any domestic corporation created for the construction and operation of street railways, urban railways, or inter-urban railways;

(4) Any domestic or foreign corportation created for the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage;

(5) Any domestic or foreign corporation

created for the piping and marketing of natural gas for the purpose of supplying the public with natural gas or any partnership, which is or will be a natural gas company or an intrastate natural gas transporter as defined by federal or state law, composed entirely of such corporations or composed of the wholly owned subsidiaries of such corporations.

(6) Any domestic or foreign corporation created for the purpose of transmitting intelligence by telegraph or telephone;

(7) Any domestic or foreign corporation created for the purpose of generating, transmitting and distributing electricity and steam for power, lighting heating or other such uses. The generating plants, buildings, transmission lines, stations, and substations expropriated or for which property was expropriated shall be so located, constructed, operating, and maintained as not to be

dangerous to persons or property not interfere with the use of the wires of other using companies or, more than is necessary, with the convenience of the landowners."

(8) All persons included in the definition of common carrier pipelines as set forth in R.S. 45:251;

(9) Any domestic or foreign corporation created for piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline as otherwise provided for in R.S. 30:721 through 30:723;

(10) Any domestic or foreigh corporation or any partnership composed of such corporations or wholly owned subsidiaries thereof engaged in the piping or marketing of carbon dioxide for use in connection with a secondary or tertiary recovery project for the enhanced recovery of liquid or gaseous hydro-carbons approved by the commissioner of conservation.

Property may be so expropriated for the transportation of carbon dioxide for underground injection in connection with such projects."

STATEMENT OF THE CASE

This is an application for a Writ of Certiorari to review the Judgment of the State Court in a suit filed by Southern Natural Gas Company.

These are expropriation cases from Bienville Parish, Louisiana, in which Southern Natural Gas Company seeks to expropriate certain rights of the defendants. After many hearings and a protracted trial, the District Court determined that Southern Natural Gas Company had a right to expropriate and that the project was public and necessary. Petitioners asked for a jury trial on the question of damages. The jury returned a verdict of $3,500.00 per acre for the

storage rights taken, together with a judgment of approximately $2,500.00 for the mineral rights taken.

Southern Natural Gas Company, in these consolidated cases, seeks to expropriate a uniquely configured underground area for the storage of natural gas. It is the position of petitioner that said area is capable of producing and will produce oil and gas in paying quantities and that it is not feasible to use same for underground gas storage. Also, certain surface rights are being expropriated. Petitioners feel that a prudent operator would not have abandoned the Bear Creek Field in Bienville Parish for storage purposes.

This matter was appealed to the Honorable Second Circuit Court of Appeal, State of Louisiana, and on November 2, 1981, a judgment was rendered by the Honorable Second Circuit Court of Appeal, which the Honorable

Second Circuit Court of Appeal reduced the amount of damages that was found by the jury on the trial of the matter. An Application for Rehearing was filed by petitioners on December 10, 1981. Said Application for Rehearing was denied by the Honorable Second Circuit Court of Appeal. The petitioners then filed for writs to the Honorable Supreme Court of the State of Louisiana on Application for Writs of Certiorari and/or review. On February 19, 1982, the Honorable Supreme Court of the State of Louisiana denied writs.

REASONS FOR GRANTING THE WRIT

To answer the foregoing questing will make it obvious why a Writ should be granted herein:

I. THIS WRIT SHOULD BE GRANTED AS A MATTER OF LAW AND A MATTER OF EQUITY TO REVERSE THE FINDING OF THE LOUISIANA SUPREME COURT IN THAT THE LOUISIANA SUPREME

COURT ERRED IN NOT RULING THAT LSA-R.S. 30:22 AND LSA-R.S. 19:2 ARE UNCONSTITUTIONAL IN THAT THESE TWO STATUTES ARE IN VIOLATION OF AMENDMENT V OF THE UNITED STATES CONSTITUTION; IN VIOLATION OF AMENDMENT XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION; THESE TWO STATUTES ARE IN VIOLATION OF THE UNITED STATES CONSTITUTION IN THAT THEY DEPRIVE A PERSON OF PROPERTY, WITHOUT DUE PROCESS OF LAW, IN THAT THEY ALLOW ONE PERSON, BEING A COMMISSIONER OF CONSERVATION, TO TAKE PRIVATE PROPERTY AND IN THE TAKING OF PRIVATE PROPERTY NOT ALLOW JUST COMPENSATION TO THE PROPERTY OWNERS.

LSA-R.S. 30:22 states as follows:

"...C. The commissioner shall determine with respect to any such underground resevoir proposed to be used as a storage reservoir, whether or not such resevoir is fully depleted of the

original commercially recoverable natural gas and condensate content therein. If the commissioner finds that such reservoir has not been fully depleted, the commissioner shall determine the amount of the remaining commercially recoverable natural gas and condensate content of such reservoir.

D. The commissioner may issure any necessary order providing that all natural gas which has previously been reduced to possession, and which is subsequently injected into an underground storage reservoir shall at all times be deemed the property of the injector, his sucessors and assigns; and in no event shall such gas be subjuct to the right of the owner of the surface of the lands or of any mineral interest therein under which such underground storage reservoir shall lie or be adjacent to or of any

person other than the injector, his successors and assigns, to produce, take, reduce to possession waste or otherwise interfere with or exercise any control thereover; provided that the injector, his successors and assigns, shall have no right to gas in any stratum or portion thereof not determined by the commissioner to constitute an approved underground storage reservoir. The commissioner shall issure such orders, rules and regulations as may be necessary for the purpose of protecting any such underground storage reservoir, strata or formations against pollution or against the escape of natural gas therefrom, including such necessary rules and regulations as may pertain to the drilling into or through such underground storage reservoir."

LSA-R.S. 19:2 states as follows:

"Where a price cannot be agreed upon

with the owner, any of the following may expropriate needed property:

(1) The state or its political corporations or subdivisions created for the purpose of exercising any state government powers;

(2) Any domestic or foreign corporation created for the construction of railroads, toll roads, or navigation canals;

(3) Any domestic corporation created for the construction and operation of street railways, urban railways, or interurban railways;

(4) Any domestic or foreigh corporation created for the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage;

(5) Any domestic or foreign corporation created for the piping and marketing of natural gas for the purpose of supplying the public with natural gas or any partnership, which is or will be a natural gas company or an intrastate natural gas transporter as defined by federal or state law, composed entirely of such corporations or composed of the wholly owned subsidiaries of such corporations.

(6) Any domestic or foreign corporation created for the purpose of transmitting intelligence by telegraph or telephone;

(7) Any domestic or foreign corporation created for the purpose of generating, transmitting and distributing electricity and steam for power, lighting, heating or other such uses. The generating plants, buildings, transmission lines, stations, and substations expropriated

or for which property was expropriated shall be so located; constructed, operated and maintained as not to be dangerous to persons or property nor interfere with the use of the wires using companies or, more than is necessary, with the convenience of the landowners;

(8) All persons included in the definition of common carrier pipelines as set forth in R.S. 45:251;

(9) Any domestic or foreign corporation created for piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline as otherwise provided for in R.S. 30:721 through 30:723;

(10) Any domestic or foreign corporation or any partnership composed of such corporations or wholly owned subsidiaries thereof engaged in the piping or marketing of carbon dioxide for use

in connection with a secondary or tertiary recovery project for the enhanced recovery of liquid of gaseous hydro-carbons approved by the commissioner of conservation. Property may be so expropriated for the transportation of carbon dioxide for underground injection in connection with such projects."

Both of these statutes are unconstitutional. The bodies of said statutes are broader than the title thereof. Under Article 1, Section 4 of the Louisiana Constitution of 1974, it must be determined in a judicial proceeding whether the purpose of the taking of private property is "public and necessary". LSA-R.S. 30:22 and LSA-R.S. 19:2 allows one to determine whether the taking of property is "public and necessary" without a judicial proceeding in violation of Article 1, Section 4 of the Louisiana Constitution of 1974. This is also a violation of the provisions of Amemdment V of the United States Constitution

and they are also in violation of Amendment XIV, Section 1 of the United States Constitution.

The 1974 Constitution of Louisiana, particularly the above cited portion, being Article 1, Section 4, was intended to give a far reaching effect and new protection of the rights of citizens to own and control provate property and this part of the 1974 Constitution of Louisiana actually goes beyond the provisions of the Federal Constitution in limiting the power of the government to regulate and control private property. See State vs. Green GMC Van, 354 So.2d 479.

LSA-R.S. 30:22 purports to establish that the underground storage of natural gas is in the public interest and for a public purpose, said determination being initially made by the Legislature contrary to the provisions of the Louisiana Constitution

and also the Federal Constitution which makes this a judicial function. LSA-R.S. 30:22 further illegally, unlawfully and unconstitutionally delegates to the Commissioner of Conservation the power to determine public interest and public purpose insofar as gas reservoirs are concerned, contrary to provisions of the Louisiana Constitution and provisions of the United States Constitution, and this in a sense is deprivation of private property without due process of law and also can lead to a deprivation of public property without just compensation.

In further support of the petitioners position State of Louisiana Acts 1906, number 208, said Acts being embodied into LSA-R.S. 19:2. LSA-R.S. 19:2 must be construed as a continuation of the 1906 Act and not as provided in the power of expropriation that the 1906 Act did not provide. A constitutional interpretation of LSA-R.S. 30:22 would make the findings of the Commissioner of

Conservation of the State of Louisiana only a threshold determination and would impose upon the judiciary the duty as provided under Article 1, Section 4 of the Louisiana Constitution of 1974 in which a determination as to "public and necessary" would be made independently by the judicial system and it is unconstitutional for a statute to allow one person, being the Commissioner of Conservation, to determine whether or not a person can be deprived of his private property without due process of law and just compensation.

Under the Louisiana Constitution and the United States Constitution the determination as to whether a project is "public and necessary" Should be a judicial question under the Constitution of Louisiana and the Constitution of the United States and should not be a question and left up to one person, being the Commissioner of Conservation of the State of Louisiana.

Article 1, Section 4 of the Louisiana Constitution of 1974 provides in part:

> "...Property shall not be taken or damaged by any private entity authorizedby law to expropriate, except for public and necessary purpose and with just compensation paid to the owners; in such proceedings, whether the purpose is public and necessary shall be a judicial question..."

Under the United States Constitution, Amendment XIV, Section 1 and Amendment 5, there is language provided in the United States Constitution to the same effect. The taking of property should be a judicial question as to whether or not it is "public and necessary". As reflected on the trial of the matter, the determination of whether this project was "public and necessary" was not done judicially, but was made by one

person, being the Commissioner of Conservation of the State of Louisiana. This is a violation of the Louisiana Constitution and the United States Constitution. LSA-R.S. 30:22 and 19:2 are unconstitutional, in that they do give the Commissioner of Conservation too much power to make an individual determination.

To show this Honorable United States Supreme Court how these property owners have been deprived of their property without just compensation, a clear reading of the opinion rendered by the Honorable Second Circuit Court of Appeal in which they reduced the damage awards that were given by the jury at the trial court are absolutely arbitrary and capricious and absolutely ridiculous.

In estimating the value of the property to be expropriated, the basis of assessment should be the value which the property possessed before the contemplated improve-

ment was proposed without deducting therefrom any amount for the benefit derived by the owner for the contemplated improvement or work.

LSA-R.S. 19:9 states in part:

> "The owner of property shall be compensated to the full extent of his loss."

The amounts awarded to these property owners by this Honorable Second Circuit Court of Appeal and also by the Louisiana Supreme Court, are very inadequate and are not awards of just compensation for damages suffered by thes property owners.

The Honorable Second Circuit Court of Appeal states at page 4 of the original decision herein as follows:

> "..Whether or not the reservoir is capable of producing oil and is capable of producing oil in paying quantities, whether or not three-fourths of the

owners in interest have agreed to the reservoir being used for the storage of natural gas, whether or not the reservoir is suitable and feasible for the storage of natural gas, and all other determinations set forth in LSA-R.S. 30:33 (B) which are required to be made by the Commissioner, are matters to be contested before the Commissioner or in an action before the Commissioner, and are not before the Court in expropriation action."

Obviously from the above statement, the above statement explains, in part, why the decision by the Honorable Second Circuit Court of Appeal is erroneous. How can any court make a determination as to whether or not the project before it is "public and necessary" without determining the above stated matters? Further, how can a court make an independent determination under the Constitution of Louisiana and under the

United States Constitution without determining the above stated factors as quoted from the decision of the Second Circuit Court of Appeal?

As Your Honors are aware, the right to own property is an essential constitutional right that each and every person has. By granting writs in this matter the Honorable United States Supreme Court can see how unconstitutional the statutes in question are, in that they do deprive persons of their property without due process of law and as in this case, without just compensation. The Honorable Second Circuit Court of Appeal, State of Louisiana, and also the Honorable Louisiana Supreme Court have violated these property owners constitutional rights, in that they have upheld the statutes, being LSA-R.S. 30:22 and LSA-R.S. 19:2, in that both of these statutes are unconstitutional on their face, in violation of the Louisiana Constitution of 1974 and also in

violation of the United States Constitution, Amendment V and Amendment XIV.

Therefore, Your Honors must grant Writs of Review in this matter to determine whether these particular statutes are unconstitutional in that they do deprive persons of their property without due process of law and without just compensation.

IN CONCLUSION

The petition for a Writ of Certiorari to this United States Supreme Court and to Your Honors should be granted to make a determination of whether said statutes in the State of Louisiana are unconstitutional in violation of the Louisiana Constitution and of the United States Constitution.

LAW OFFICES OF BOBBY L. CULPEPPER
525 EAST COURT AVENUE
JONESBORO, LOUISIANA 71251
(318) 259-4182

BY: _____
BOBBY L. CULPEPPER

C E R T I F I C A T E

I hereby certify that a copy of the foregoing has been mailed, this date, postage prepaid, to all counsel of record, John M. Wilson, Liskow & Lewis, Attorneys at Law, 50th Floor, One Shell Square, New Orleans, Louisiana 70139, and also the Supreme Court of Louisiana and the Honorable Second Circuit Court of Appeals, State of Louisiana, on this the 10th day of May , 1982.

BOBBY L. CULPEPPER

EXHIBIT "A"

THE SUPREME COURT OF THE STATE OF LOUISIANA

SOUTHERN NATURAL GAS COMPANY 82-C-0058

VERSUS

BILLIE J. CUMMINGS POLAND, ET AL,
CHARLES WESLEY JORDAN, ET AL,
WILLIAM TRAVIS LOWREY, ET AL,
WILLIAM TRAVIS LOWREY, ET AL,
STEVEN W. SUTTON, ET AL,
ELMER D. WALKER, ET AL,
GLENN C. LOWREY, ET AL,
GRACE PRUITT,
LARRY C. SUTTON, ET AL,
BILLIE C. SUTTON, ET AL,

- - - - - -

In Re: Billie J. Cummings Poland, et al applying for Writ of Certiorari or Review, to the Court of Appeal, Second Circuit, Parish of Bienville, Nos. 14,670 - 14,679 (consolidated cases).

- - - - - -

February 19, 1982

Denied.

PFC

WFM

JLD

FAB

HTL

DIXON, C.J. and WATSON, J. would grant only as to attorney fee issue.

Supreme Court of Louisiana
February 19, 1982

_____
Clerk of Court
For the Court

EXHIBIT "A"

THE SUPREME COURT OF THE STATE OF LOUISIANA

SOUTHERN NATURAL GAS COMPANY

VERSUS No.82-C-0057

BILL C. SUTTON, ET AL

and

SOUTHERN NATURAL GAS COMPANY

VERSUS

SUN FRESH FARMS OF LOUISIANA PARTNERSHIP, ET AL

- - - - - -

Re: Bill C. Sutton, Et Al and Sun Fresh Farms of Louisiana, Partnershit, Et Al, applying for Certiorari, or writ of Review, to the Court of Appeal Second Circuit, Parish of Bienville, Number 14,684 - 14,685.

- - - - - -

February 19, 1982

Denied.

PFC

WFM

JLD

FAB

HTL

DIXON, C.J. and WATSON, J. would grant only as to attorney fee issue.

Supreme Court of Louisiana
Februsry 19, 1982

_____
Clerk of Court
For the Court

EXHIBIT "B"

SOUTHERN NATURAL GAS COMPANY,
Plaintiff-Appellee,

v.

Billie J. Cummings POLAND, et al.

Charles Wesley JORDAN, et al.

William Travis LOWREY, et al.

William Travis LOWREY, et al.

Steven W. SUTTON, et al.

Elmer D. WALKER, et al.

Glenn C. LOWREY, et al.

Grace PRUITT.

Larry C. SUTTON, et al.

Bill C. SUTTON, et al.,
Defendants-Appellants.

Nos. 14,670-14,679

Court of Appeal of Louisiana,
Second Circuit,

Nov. 2, 1981.

En Banc. Rehearing Denied

Dec. 10, 1981.

Before PRICE, HALL and MARVIN, JJ.

MARVIN, Judge.

In these nine appeals in ten consolidated actions under LRS 19:2(5), the judgments expropriated from the several defendants their respective rights in and above an underground reservoir for the storage of natural gas, fixed compensation to be paid for those rights, and in six cases, cast plaintiff Southern Natural with costs and attorney fees incurred by defendants.[1]

In 12 assignments of error in these appeals, defendants question the constitutionality of the expropriation statutes and whether the statutory requirements for expropriation were met by Southern Natural. Alternatively, defendants seek to increase the amount awarded as conpensation. Southern Natural's answer in six appeals seeks to

---

1. This reservoir is porous limestone called Pettit Zone at a dept of 6968-7080 feet underlying about 13,000 surface acres in the Bear Creek Field about 7 miles South of Arcadia, seat of Bienville Parish.

amend the judgments where Southern Natural was cast for costs and attorney fees. We amend and affirm.

PREFACE

THE CONSTITUTIONAL AND STATUTORY REQUIREMENTS

LSA - Constn. Art. 1, & 4, expressly provided that the right of a person to own and enjoy private property is subject to the reasonable exercise of police power and that for a public and necessary purpose, with just compensation paid to the owner, private property may be expropriated by a private entity authorized by law to expropriate.

LRA 19:2(5) provided that if a price cannot be agreed on with the owner of property (after good faith negotiation), the needed property may be expropriated by any domestic or foreign corporation created for the piping and marketing of natural gas for the purpose of supplying the public with natural gas. In a later enacted statute, LRS 30:22, the legislature has declared that the underground

storage and reservation of large quantities of natural gas, for orderly withdrawal in periods of peak demand by the consumer, is in the public interest, and public purpose.

LRS 30:22 requires any person, prior to and as a condition precedent to exercising the power to expropriate any underground reservoir for the storage of natural gas, to obtain the express approval of the Commissioner of Conservation. Under the statute, the Commissioner is required to give notice to the persons affected by the expropriation, hold hearings and to determine

--that the reservoir is suitable and feasible for the purpose;

--that no reservoir which is capable of producing oil in paying quantities shall be used for storage purposes unless such reservoir has a greater value for storage than the production of the remaining volumes of original reservoir natural gas and condensate, and at least 3/4ths of the owners in

interest, exclusive of any "lessor" defined in LRS 41:1261, have consented to such use in writing,

--that the storage will not contaminate other formations containing fresh water, oil, gas, or other commercial mineral deposits, and

--that the storage will not endanger lives or property.

The Commissioner is also required to determine the amount of the original commercially recoverable gas and condensate remaining in the reservoir, if any. See LRS 30:22(B) and (C).

The Commissioner's order may be appealled or challenged in judicial proceedings at the Commissioner's domicile in East Baton Rouge Parish. When final, the Commissioner's order shall be taken as prima facie valid and may not be collaterally attacked. LRS 30:12 Interstate Oil Pipe Line Co. v. Guilbeau, 217 La. 160, 46 So.2d 113 (1950); Brown vs. Alice-Sydney Oil Co., 343 So.2d 745 (La.App.

2d Cir. 1977).

Natural gas marketing companies do not enjoy quick-taking expropriation power such as is enjoyed by the Department of Highways, but must first establish in an expropriation action, the public and necessary purpose to be served by the exproriation (LSA-Constn. Art. 1, & 4), the approval of the Commissioner of Conservation (LRA 30:22(B)), and that good faith negotiation has been conducted with the owner for acquisition of the property (LRS 19:2(5)). After these prerequisites have been established the amount of just compensation under LSA Constn. Art. 1, & 4, is to be judicially determined. Compare LRS 48:441 and LRS 19:2 et seq.

Obviously in an effort to expedite a Title 19 expropriation, the legislature requires that a defendant file all of his defenses within 15 days after he has been served with notice of the trial date. This requirement prevents a defendant from rais-

ing defenses piecemeal and protracting the litigation. LRS 19:6,7.

Southern Natural filed 75 suits in 1979 for expropriation in this project in the Bear Creek field in Bienville Parish, Only 15 of which remained pending for trial in September 1980. Earlier in 1980 in appeals in nine cases, we noted that the trial court had found the requisite good faith negotiation, the approval of the Commissioner, and the necessary and public purpose of the project. Southern Natural Gas Co. v. Poland, 384 So.2d 528 (La. App. 2d Cir. 1980). Writs were denied by the Louisiana Supreme Court. 386 So.2d 363 (La. 1980).

Thereafter, and shortly before the September 1980 trial date, in nine of the cases here appealed, defendants-appellants filed exceptions, pleas of unconstitutionality, and motions to continue the trial. The trial court dismissed the suits on an exception which attacked the Commissioner's order

approving the storage of gas in the reservoir, but did not rule on the plea of constitutionality or on the motion for continuance. We granted supervisory writs, reversed the trial court, overruled the exception attacking the Commissioner's order and remanded the cases for trial on September 10, 1980, stating in an unpublished order on September 8, 1980:

> "Even if these exceptions were timely filed and (even) if Bienville Parish is a parish of proper venue in which to question the sufficiency of an Order of the Commissioner of Conservation (which questions we do not now reach), we find the Order of the Commissioner of April 20, 1979, to be in compliance with LRS 30:22."

The Louisiana Supreme Court upheld this order by denying an application for review of this order. 380 So.2d 80 (La. 1980). The trial court then denied a continuance and these

cases proceeded to trial.

After a five day trial on the taking issue, the trial court found that the proposed expropriation was for a public and necessary purpose, that Southern Natural was a corporation authorized to expropriate and had obtained the proper order or orders giving the approval of the Commissioner of Conservation, and that Southern Natural had negotiated in good faith with the owners before petitioning for expropriation. After this ruling the compensation issue was tried and determined by the court.

ASSIGNMENTS OF ERROR 1-6

Appellants continue their attack on the Commissioner's order in assignments 1 and 2, arguing, among other things, that the reservoir in question is capable of producing oil in paying quantities, that Southern Natural is not a prudent operator, that Southern Natural knowingly presented false

information to the Commissioner and acted fraudulently and unfairly to obtain the Commissioner's order, and in respect to acquiring property rights in and above the reservoir, Southern Natural has attempted "to take ... through coercion, fright and deceit." In essence, appellants seek that we reverse the judgments ordering expropriation on the grounds that the Commissioner's order is invalid and not in compliance with the statute.

(1) An order of the Commissioner of Conservation is not sacrosanct and may be attacked on any grounds in a hearing called for that purpose before the Commissioner. Any interested person has the right to have the Commissioner call a hearing for the purpose of taking action on a matter withing his jurisdiction and the Commissioner is required to promptly call a hearing. LRS 30:6(F). An interested person affected by an order of the Commissioner may obtain judicial and summary review of the Commissioner's order

by filing suit at the Commissioner's domicile in East Baton Rouge Parish. LRS 30:12.[2]

(2,3) Courts have consistently upheld these legislative limitations as to where review of the Commissioner's order may be obtained. Interstate Oil Pipe Line Co. v. Guilbeau, supra; Brown v. Alice-Sydney Oil Co., supra; Theriot v. Mermentau Resources, Inc., 385 So.2d 939 (La. App. 3d Cir. 1980). Until the order of the Commissioner is modified or annulled as the legislature directs, the order is prima facie valid and is not subject to collateral attack. The legislature simply has not given the Bienville Parish Court or this court the jurisdictional authority to adjudge invalid an order of the

---

2. Defendant in our docket No. 14,671, Charlie W. Jordan, has questioned the validity of the Commissioner's Order in an action against the Commissioner in East Baton Rouge Parish. That action is yet pending. See Jordan v. Sutton, 401 So.2d 389 (La. App. 1st Cir. 1981). Jordan is represented in that action by the same counsel in this appeal and some of the issues raised there are raised here.

Commissioner of Conservation. That authority has been given to the courts having geographical jurisdiction in East Baton Rouge Parish, the domicile of the Commissioner of Conservation.

(4) Thus, any question as to the validity or correctness of the determinations that the legislature has required the Commissioner to make in LRS 30:22(B), must be raised in a direct proceeding either before the Commissioner or against the Commissioner in a judicial proceeding at his domicile. Assignments 1 and 2 present no error. We note that most of the § 22 determinations the legislature has required the Commissioner to make require the technical expertise of geologists, engineers and other experts available to the Conservation Commission which es generally charged by the legislature with the great public duty of monitoring the natural resources of the state.

The legislature has also required that

expropriation actions under LSA-Constn. Art. 1, § 4 and LSA 19:2(5) be instituted in the district court of the parish where the property is located and that certain prerequisites be established to the satisfaction of the court before expropriation may be ordered. The first prerequisite is that the expropriator shall have obtained the express approval of the Commissioner of Conservation for using an underground reservoir for natural gas storage purposes. The second is that the expropriator shall have negotiated with the owner to acquire the right to store natural gas in the reservoir. Courts have added the requirement that this negotiation must have been "good faith" negotiation. Once the court is satisfied that these prerequisites have been met, the court is constitutionally required to make the determination whether the expropriation is for a public and necessary purpose, and, if so, to determine just compensation for the property right that is

ordered expropriated.

(5) Appellants assert in assignment 3 that the bodies of the two statutes in question are broader than their titles and are in conflict with the constitutional requirement that the public and necessary purpose of the expropriation is to be judicially determined. The first argument of broadness was squarely presented in Mid-Louisiana Gas Co. vs. Sanchez, 280 So2d 406 (La. App. 4th Cir. 1973), writs denied, and the statutes were held constitutional. When writs were denied in that case by the Louisiana Supreme Court in 1973, the issue of these expropriation statutes being unconstitutional because of broadness beyond title was resolved.

(6) The second constitutional argument, also presented in assignments 4 and 6, questions whether there was a judicial determination that the storage of natural gas in the Bear Creed reservoir is for a public and necessary purpose. The fact that the legis-

lature has declared public policy in LRS 30:22(A) and has required the Commissioner of Conservation to hold hearings and make similar findings of public necessity and purpose, does not relieve the trial court of its constitutional duty of making the eventual determination. The constitution does not forbid the legislature from adding reasonable statutory prerequisites for expropriation that are obviously designed for the protection of the public and the fulfillment of the constitutional mandate of public purpose and necessity. LSA-Constn. Art. 1 § 4. Findings and orders of public adminstrative agencies may be considered as evidence in a judicial proceeding for the purpose of determining public and necessary purpose. See Texas Eastern Transmission Corporation v. Bowman, 238 La. 399, 115 So.2d 797 (1959); United Gas Pipe Line Company v. Landry, 228 So.2d 565 (La. App. 1st Cir. 1969).

(7) In addition to evidence of the find-

ings and orders of the federal and state agencies here involved, Southern Natural produced direct testimony about the storage project and its function from one of its engineers, who is a 32-year employee and an assistant vice president of the company. Southern Natural produces and sells gas to gas companies who then further distribute and resell the gas to the individual consumer, usually in interstate commerce. These companies and Southern Natural are regulated by governmental agencies because of their public utility function.

During slack periods of consumer demand, natural gas would be injected into the reservoir. During peak periods of demand this gas would be released into the pipeline for eventual consumer use when the normal supply of gas from producing wells is not sufficient to meet the peak demand. This witness also testified that the storage of natural gas in the porous rock of essentially depleted re-

servoirs is an efficient, economic, and proven way to better meet the peak demand for gas by the public, and that the Bear Creek reservoir is such an essentially depleted reservoir of adequate size and character to accomplish this purpose. The trial court referred to this testimony and to the public agency findings and orders as the basis for determining that the expropriation was for a public and necessary purpose.

Appellants did not offer evidence to contradict this evidence and the trial court made its determination of public and necessary purpose on the basis of uncontradicted evidence and testimony. We find no evidentiary foundation in this record for appellants' allegations that the trial court "rubber stamped" the findings of the governmental agencies.

Assignments 3, 4, and 6 present no error.

(8) The fifth assignment is that the trial court erred in determining that South-

ern Natural had negotiated with defendants (LRS 19:2), in good faith (Dixie Pipeline Company vs. Barry, 227 So.2d 1 (La. App.3d Cir. 1969), writ refused). This determination can only be made on the circumstances of the individual case and essentially calls for a factual determination by the trial court that is entitled to great weight on appeal. Dixie Electric Membership Corporation v. Watts, 268 So.2d 128 (La.App. 1st Cir. 1972); Southwest La. Elec. Membership Corp. v. Lemon, 338 So. 2d 367 (La.App. 3d Cir. 1976), writ refused.

Southern Natural's agents testified about negotiating with these defendants and that they kept daily logs of the contacts made with these defendants beginning in 1978. The logs were introduced into evidence.[3] In add-

---

3. The log in appellant docket nos. 14,672 and 14,673, for instance, shows that plaintiffs agents contacted defendant William Travis Lowrey on these occasions before suit wa filed:

"DATE: August 30, 1978
"OFFER: $10,960 for Option Agreement with a portion payable upon execution

of the Agreement and the balance due upon exercise of the Option by Southern Natural Gas Company. * * *
"DATE: October 26, 1978
"OFFER: $13,334 for an Option Agreement with a portion payable upon execution of the Agreement and the balance due upon exercise of the Option. Additionally, an offer of $800 per acre for permanent rights-of-way, the number of acres to be determined immediately upon completion of the installation of such surface facilities. * * *
"DATE: December 21, 1978.
"OFFER: $28,050 for an Option Agreement with $800 per acre for permanent well sites and rights-of-way acreage. * * *
"DATE: April 4, 1979
"OFFER: $28,050 (It is noted that the Agent was supposed to have increased the offer at this time; however this was not done.) * * *
"DATE: August 6, 1979
"OFFER: $68,680 total payable in full upon execution of the Agreement. This offer was based on an ownership of 189.169 surface acres, 48.563 mineral and royalty acres, 1.355 MCF gas, 9.207 barrells of condensate together with the anticipated use of 8 acres permanent well sites and rights-of-way at $1,500 per acre and 7 acres of temporary workspace at $750 per acre.
"COMMENTS: Mr. Lowrey maintained his same position as previously stated in that he does not desire to sell and convey any property rights but would be willing to discuss terms for a lease of the desired storage rights. He further objected to the right to drill water wells as deemed necessary, contending that an overabundance of such wells might lower present water tables. Mr. Lowrey indicated he might

ition to these contacts by telephone and in person, plaintiff sent defendants certified letters inviting negotiation. Where the petitioner for expropriation shows contacts with an owner prima facially indicating good faith negotiations, the owner must introduce circumstances to overcome this prima facie indication. See Dakin and Klein, Eminent

---

consider leasing specified water rights along the same lines that he would consider storage rights. During the course of this meeting, an offer was presented to Mr. Lowrey in the amount of $1,200 per acre for the purchase of 7.18 acres of land adjacent to the existing Southern Natural Gas Company station site at Bienville. Prior attempts to purchase this property before the acquisition of storage rights had been unsuccessful. It was the desire of Southern Natural to purchase 5.57 acres, but due to the configuration and lay of the land, they were willing to purchase an additional 1.61 acres as well. Mr. Lowrey stated that he had attempted to negotiate a deal with Southern Natural earlier and that they had not seen fit to consider his terms; therefore, he saw no reason to consider or discuss this property furthur. Mr. Lowrey was advised that this was our final contact as well as our final attempt to purchase the desired storage rights."

Domain in Louisiana, p.301 (1970).

The statute requires negotiation as a prerequisite to bringing suit for expropriation. Before the suit was brought in 1979 it was not necessary that negotiations for community property rights be conducted with both the husband and wife. The husband, as the head and master, could bind the community. Appellants have not overcome the prima facie indication that plaintiff's negotiation, however fruitless, was other than in good faith. Substantial evidence supports the trial court's determination of good faith negotiation and assignment 5 presents no error.

JUST COMPENSATION

(9) The determination of what amount will compensate the owner of a property right to the full extent of his loss because of expropriation of the right must be made on the basis of the facts of each case and in accord with the uniqueness of the thing

taken. Trunkline Gas Co. v. Rawls, 394 So.2d 1250 (La.App. 2d Cir. 1981).

(10) Compensation is payable for the value of the recoverable natural gas and condensate remaining in the reservoir, the value of the underground storage right, and the value of the servitude rights on the surface. The unrecoverable gas in the reservoir may be considered as an element or factor in determining the value of the storage right. Mid-Louisiana Gas Company v. Sanchez, supra.

(11) The trial court accepted Southern Natural's expert testimony and found the amount of recoverable gas and condensate to be the amount in the Commissioner's order, less the amount that was shown to have been produced since November 1, 1978. The fair market value of recoverable gas and condensate was determined from the testimony of another expert who allowed a 20 month production time and applied a reasonable dis-

count to reach a present value for the gas and condensate. The price of gas was based on the ceiling set by the Federal Energy Regulatory Commission, the government agency that sets the price of interstate gas. Condensate was based on market price per barrel. Defendants offered no expert testimony as to the value of the recoverable gas and condensate, but presented a geologist who testified that there was a "possiblilty" that there was more gas and condensate in the reservoir(s) than had been represented to the Commissioner and to the court.

The court determined the surface value and reservoir value from plaintiff's expert who used the market data, comparable sales, approach. The highest and best use of the surface was found to be for the production of timber, except that some tracts were better suited for rural homesites or pasture. Timber was appraised by other appraisers. Plaintiff's expert used 41 comparable sales as a basis

for his appraisal. These sales occured prior to the Commissioner's order. Defendants' appraiser based his appraisal on one sale (called the Enterprise sale) he contended was comparable but which he had not "verified". The court accepted the defendants' witness as an expert appraiser, but rejected his appraisal because it was based only on this one comparable. The court accepted the estimate of the quantity of timber on one tract that was made by defendant's expert. The court accepted the higher appraisal of plaintiff's expert as to the unit value of the timber to reach the total value of the timber on that tract.

The court determined the value of the storage right on the basis of expert testimony offered by plaintiff's appraiser, whose testimony had also been accepted by the court as the basis for the court's determination of the value of the surface rights. This appraiser analyzed sales of storage rights by 177 owners in the Bear Creek field, all of which

had been made before expropriation suits were filed. These sales revealed an average price of $222 per acre, and included five sales where the seller was considered as knowledgable as the purchaser about the method of determining the value of the storage right. This group was paid prices ranging from $187 to $205 per acre for the storage right. Plaintiff's appraiser and appraisers for sellers in this group were familiar with and utilized the appraisal approach approved in the 1973 case of Mid-Louisiana Gas Co. v. Sanchez, cited supra.

In this group of knowledgeable sellers was Continental Group, Inc., which owned 3900 acres, constituting 30 percent of the total acreage needed for the storage right. Continental knew that unless it sold its storage right to plaintiff, plaintiff could not have exercised the statutory expropriation power, and to this extent, Continental was in much better bargaining position than

was plaintiff. Continental had the services of two attorneys and two geologists, one of which had been an appraiser for the property owners in the 1973 Sanchez case. Continental's executive vice president, who conducted the negotiations for Continental, testified that he knew that Southern Natural could not expropriate Continental's property rights, that Continental was represented by competent experts, and that Continental's decision to sell its storage rights was made on the basis that it was preferred to make the best bargain possible to sell the storage rights over continuing to own its interest in what would have been eventually an empty and essentially worthless underground reservoir. Continental was paid $195.38 per acre for its storage rights.

THE SANCHEZ DECISION

Defendants' assignment 7 complains that the trial court erred in interpreting the

Sanchez decision. Sanchez expressly rejected the argument that the value of the storage right should be determined by what it would cost to replace the unrecoverable gas in the underground reservoir. Sanchez held that market value, comparable sales, was the method by which the value of the storage right should be determined and that the presence of unrecoverable gas in the reservoir was a factor or an element which could be used to determine the value of the reservoir to be used for storage purposes. This was the approach taken by plaintiff's appraiser and the trial court and we find no error in assignment 7.

THE ENTERPRISE SALE

In 1976, Enterprise Products Company purchased 174 acres, subject to timber and minerals being reserved, for a price in excess of $600,000. This property, which is about seven miles from the Bear Creek property and

is adjacent to the Arcadia municipal limits, contains a huge salt dome. The property was acquired for the storage and marketing of liquid hydrocarbons in a hollow cavity created by washing out of portion of the salt. Plaintiff's expert witness explained that the salt dome cavity of 174 acres was well suited for the storage of liquid hydrocarbons (butane and propane) and was 47 times greater in BTU heating capacity per area unit than was the porous rock reservoir. Defendants produced no comparable expert with respect to the suitability or comparability, but relied on its expert appraiser to testify that he considered this as the one comparable sale solely on the face of the public record.

(12) The trial court accepted defendants' witness as an appraiser, but rejected his appraisal based on market value determined solely by the Enterprise sales price. Defendant's assignment 8 asserts that this was error. We cannot agree. A trial court has

great discretion in accepting and weighing expert testimony to determine just compensation. In the absence of a showing of manifest error and where the determination is reasonably supported by expert evidence, the trial judge's determination will be upheld on appeal. City of Shreveport v. Pupillo, 390 So.2d 941 (La.App. 2d Cir. 1980).

OTHER ASSIGNMENTS

Appellants contend in the remaining assignments 9-12 that the awards are inadequate, that greater rights have been taken than prayed for, that attorney fees and expert witness fees should be increased, and that the evidence proffered should negate the public and necessary purpose of the expropriation and the awards as being just compensation. Except for the quantum of the fees and the just compensation issues, the thrust of these assignments have been considered under the heading "Assignments 1-6",

and have been found to be without merit.

We reiterate that for expropriation of an underground reservoir for natural gas storage, the statute requires only that the petitioner show express approval of the Commissioner, good faith negotiation, and the public and necessary purpose of the expropriation. Whether or not the reservoir is capable of producing oil and in paying quantities, whether or not three-fourths of the owners in interest have agreed to the reservoir being used for the storage of natural gas, whether or not the reservoir is suitable and feasible for the storage of natural gas, and all other determinations set forth in LRS 30:22B which are required to be made by the Commissioner, are matters to be contested before the Commissioner or in an action against the Commissioner, and are not before the court in an expropriation action. The proffered evidence could possibly be weighed and construed by the Commissioner or by a court having

jurisdiction to negate a Commissioner's order, as grounds to modify or reverse the Commissioner's approval of the use of the reservoir for the storage of natural gas. But neither the lower court nor this court has authority to modify or reverse the Commissioner's order approving this reservoir for the storage of natural gas on any evidence, including that of fraud, as is alleged by defendants.[4] Assignment 12 presents not error.

(13) The rights expropriated here include the storage right, here belonging to the landowners, the servitude of the surface for the laying of pipelines and other facilities for the operation of the project, also belonging to the landowners, and the right to participate in the production of the remaining recoverable natural gas and condensate in the reservoir, belonging to either or both the land and the mineral right owners. These

---

4. See footnote 2.

rights are not greater than the expropriation statutes or than the expropriation petition sets forth. Assignment 10 presents no error.

(14) Assignment 11, with respect to the amount of attorney fees awarded, will be discussed under the general heading, "Attorney Fees". Assignment 11 also complains that defendants' appraiser was not allowed an expert witness fee. In these matters, the trial court is vested with great discretion and is authorized to disallow expert fees to witnesses whose testimony is found to be valueless. Louisiana Intrastate Gas Corp. v. Guidry, 357 So.2d 830 (La.App. 3d Cir. 1978), writ refused, Assignment 11 presents no error in this respect.

QUANTUM OF AWARDS

(15) Appellants do not contest the amount awarded for the recoverable gas and condensate, but do contend that the award for stor-

age rights and surface servitude should be increased from $285 per acre to $3500 per acre, the value estimated by defendants' appraiser and rejected by the trial court. See Assignment 8, supra. We reiterate that there are three distinct categories of rights taken, the right to the recoverable gas and condensate, the servitude of use of the surface, and the right to the use of the underground reservoir for storage of natural gas. Each defendant owns one or more of these rights. We show the amount of the award in each category and the highest amount that was offered by plaintiff in each appeal.

A trial court's determination of market value made from and reasonably supported by competent expert testimony will be upheld on appeal. The appellate court will review the record to decide whether the trial court's factual determination is reasonably supported by evidence. City of Shreveport v. Pupillo, supra. The testimony of plaintiff's experts

APPELLATE DOCKET NO. AND NAME	STORAGE RIGHTS	SURFACE RIGHTS	MINERAL RIGHTS	TOTAL AWARD	HIGHEST OFFER
#14,671 Jordan, et al	$37,050.54	$6,155.67	N/A	$43,206.21	$50,016.00
Perkins	8,550.00	1,758.75	N/A	10,308.75	12,165.00
#14,672 #14,673 #14,676 William T. and Jewel Lowrey	53,915.00	41,580.00	412.63	95,907.63	75,364.00
#14,674 #14,679 Bill Sutton, et al	11,400.00	N/A	401.52	11,801.52	12,950.00
#14,674 #14,679 Larry and Judith Sutton	45,372.50	1,540.00	N/A	46,912.50	42,587.00

Continued:

#14,674 Steven and Darlene Sutton	$44,887.50	$1,540.00	N/A	$46,427.50	$42,122.50
#14,675 Elmer and Ella Walker	1,425.00	100.00	N/A	1,525.00	1,190.00
#14,677 Grace Douglas	210.50	N/A	N/A	210.50	255.00

constitutes competent expert testimony and reasonably supports the lower court's value determination.[5] Assignment 9 presents no error.

ATTORNEY FEES

(16) If the highest amount offered by the expropriator is less than the compensation awarded to the owner of the property right expropriated, LRS 19:8 provides that the court may award reasonable attorney fees. Abuse of discretion in assessing the award, and its reasonableness, can only be determined by the circumstances of the individual case. See City of Shreveport v. Pupillo, supra. Defendants complain the award is too low. Plaintiff complains that the award is too high. Each litigant contends that the trial court maiifestly erred and abused its discretion.

State v. Ransome, 392 So.2d 490 (La.App.

5. See section on "Just Compensation."

1st Cir. 1980), set forth 10 factors which might be considered in determining an award of attorney fees. These factors include the intracacies of the facts and law involved, the diligence and skill of counsel, the number of appearances made, the extent and character of the labor performed, the amount involved, the importance of the litigation, and the trial court's knowledge of the services.

Attorney fees were awarded in six cases. The excess awarded over the total offered in these six cases was $29,910.65. The attorney fees awarded in these cases totaled $39,207.06[6]. While this case is important to these litigants

---

6.

DOCKET NUMBER	AMOUNT OFFERED	AMOUNT AWARDED	ATTORNEY FEES
14,672 14,673 14,767	$75,364.00	$95,907.63	$29,320.00
14,674 14,678	$84,709.50	$93,340.00	$ 6,887.06
14,675	$ 1,190.00	$ 1,525.00	$ 3,000.00

and shows some of the ingenuity of defendants' counsel, only those issues that are common to expropriation actions under LRS Titles 91 and 30 are presented. Much of the time and effort of defendants' counsel was expended on issues which have been settled by legislative act or by court decision prior to this litigation. The constitutional issue of broadness beyond title was settled in Sanchez. The jurisdictional authority to assail orders of the Commissioner of Conservation was made in Act 190 of 1962 (now LRS 30:22) and has been settled by numerous court decisions since that time. The market value method of determining value, with consideration of the factors of cushion gas remaining in the reservoir, special adaptability of the reservoir for storage, and the effect of the completed reservoir on future exploration for minerals at greater depths, was approved in Sanchez and more recently by this court in Trunkline Gas Co. v. Rawls, cited supra.

In Rawls, the appraiser for the defendant owners used these factors and the trial court awarded $21,568, using this arpraisal over the $2,785 appraisal of the plaintiff gas company. We affirmed, emphasizing that the derermination of value must be made on the basis of the facts and the uniqueness of the thing taken in each individual case. We increased the award of attorney fees in Rawls from $2,500 to $6,200 on the factor of the difference of the amount offered and the amount awarded, analogizing LRS 19:8 to LRS 48:453 (E).[7] Considering the several Ransome factors, and particularly the total amount of the award over the total offered and the character and extent of the labor performed on the crucial issue of just compensation, we find the

---

7. "Reasonable attorney fees may be awarded by the court if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment. Such attorney fees in no event shall exceed 25% of the difference between the award and the amount deposited in the registry of the court."

amount awarded as attorney fees to be unreasonable and an abuse of discretion. We shall amend the award in each case to reduce the attorney fee award which is more broadly in line with Rawls and the approach taken there. The fact that several cases were consolidated benefits defendants' counsel because of the commonality of issues in each category of rights taken.

CONCLUSION

The remaining twelfth assignment of appellants presents no error. The proffered evidence that the Petit Zone reservoir contains two separate zones and is capable of producing greater commercial quantities of oil and gas than was fraudulently represented to the Commissioner of Conservation by plaintiff, is relevant to issues triable before or against the Commissioner at the Commissioner's domicile in East Baton Rouge Parish. LRS 30:22(B), ¶ 6(F). Defendants'

own witness in the proffer stated that he did not disagree with the Commissioner's order as to the estimated quantity of gas and condensate in the reservoir. The trial court noted that defendants did not "follow through" on the trial court's offer to hear the proffered witnesses' testimony as evidence bearing on the issue of just compensation.

Appelle's complaint about being assessed with costs does not present error.

In its letter to each defendant before the expropriation action was filed, plaintiff stated:

> "Southern Natural is hereby contacting each of you in a good faith effort to reach agreement of the acquisition of the storage rights needed for the development and operation of the reservoir. In this regard it previously offered (you) as compensation ...
>
> "The company's offer in this regard was refused. Because of Southern Natural's

desire to avoid additional litigation, the offer for the acquisition of these rights was increased to ... an amount greatly exceeding the fair market value of the storage rights. * * *

"Southern Natural is entitled under law to bring an expropriation proceeding before a court of proper jurisdiction to obtain the necessary gas storage rights discussed above if it is unable, after good faith negotiations, to acquire the needed rights by agreement. Furthermore, state law provides that the property owner will be assessed costs of the expropriation proceedings if it is ultimately determined that Southern Natural has tendered at least the true value of the property rights sought to said owners before proceeding to a judicial expropriation."

LRS 19:12 provides:

"If a tender is made of the true value of the property to the owner thereof, be-

fore proceeding to a forced expropriation, the costs of the expropriation proceedings, shall be paid by the owners."

This court has held that because the assessment of costs relates directly to the owner's right to just compensation, LRS 19:12 must be strictly construed. Louisiana Gas Purchasing Corp. v. Sincox, 368 So.2d 816 (La.App. 2d Cir. 1979). Other cases have suggested an analysis of the issue of assessment of costs in expropriation actions by distinguishing between actual tender and offer of true value of the property and whether the evidence revealed that an actual tender would have been to no avail and vain and useless. Louisiana Resources Co. v. Fiske, 356 So.2d 110 (La. App. 3d Cir. 1978).

(17-19) Here the trial court assessed costs to the plaintiff only in those cases where attorney fees were awarded. We note that the test for assessing attorney fees is

the highest offer test of LRS 19:8, while the test for assessing costs is the tender of true test of LRS 19:12. While the trial court made no express findings about the tender test, we must view the record most favorably towards upholding the judgment, but must construe the statute in favor of the property owner and strictly against the expropriator because the statute is in derogation of the rights of the property owner. In this respect, however, we cannot construe § 12 tender identically with § 8 offer, and we find that the offer here was not any stronger than in Sincox, supra, where we held that an offer of the identical amount awarded by the court was not equivalent to a § 12 tender for the purposes of assessing costs. In Sincox the expropriator there mailed to the owner of the right a draft for the property right that was eventually expropriated, accompanied by a conveyance instrument, which, if executed, would have conveyed the right to the expropriator.[8]

Accordingly, we amend the judgment in each case to assess costs to plaintiff.

DISPOSITION

All judgments appealed are amended to cast plaintiff with costs.

In these appellate docket numbers the judgments are amended to reduce attorney fees as is shown:

DOCKET NOS.	EXCESS AWARD OVER OFFER	TOTAL ATTY. FEE REDUCED FROM	& AMENDED TO
14,672 14,673 14,676	$20,543	$29,320	$7,000
14,674 14,678	$ 9,032	$ 6,887	$2,850
14,675	$ 335	$ 3,000	$ 150

8. In Sincox we upheld a judgment equivalent to the highest amount offered the owner even though the only expert testimony was that the fair market value was less than the offer. The offer there was not said to be in "excess" of market value and was not conditioned or made "to avoid additional litigation" as it was here. See Southern Natural's letter to owners, quoted supra.

As amended, and at appellee's costs, judgment in each case is AFFIRMED.

EXHIBIT "B"

SOUTHERN NATURAL GAS COMPANY,
Plaintiff-Appellee,

v.

Bill C. SUTTON, et al.,
Defendants-Appellants.

v.

SUN FRESH FARMS OF LOUISIANA
PARTNERSHIP, et al.,
Defendants-Appellants.

Nos. 14684, 14685

Court of Appeal of Louisiana,
Second Circuit.

Nov. 2, 1981.

En Banc. Rehearing Denied

Dec. 10, 1981.

Before PRICE, HALL and MARVIN, JJ.

MARVIN, Judge.

These appeals arise out of two expropriation actions that were later tried and are companion cases to the appeals reported this date in Southern Natural Gas Company v. Poland, et al., 406 So.2d 657 (La.App. 2d Cir. 1981). Issues relating to the taking of the respective rights of the defendants in two acres in these consolidated cases were tried by the trial judge, while the compensation issue was tried by jury.

All of the taking issure here raised by defendants-appellants were included among the issure resolved in Poland, supra, and for the reasons assigned there, we find them without merit here.

(1) The Sutton defendants are not land owners, but own small fractional interests in the right to recover the recoverable natural gas and condensate in the reservoir underlying two 40 acre tracts and are entitled to just compensation therefor.[1] The only

expert evidence before the jury of the quantity and the value of the recoverable gas and condensate was presented by Southern Natural. Defendants presented no expert opinion evidenc. The reservoir was 98 or 99 percent depleted when these cases were tried. The uncontradicted testimony established that the value of the Suttons interest in the recoverable natural gas and condensate in this reservoir totaled $73.23, or $10.55 for Mrs. Sutton's separate interest and $64.68 for the interest of the community estate existing between her and her husband.[2]

---

1. The separate interest of Mrs. Sutton was a .000069 unit royalty interest. The community interest of the Suttons was a .000410 unit royalty interest.
2. Present values were assigned for 179,400 MCF of commercially recoverable natural gas and 1,955 barrells of condensate Mrs. Sutton's separate .000079 URI and the Sutton community .000410 URI were then multiplied by these values and quantity to produce these dollar amounts:

Separate property		
natural gas	$8.07	
condensate	2.48	$10.55
Community Property		
natural gas	$49.96	
condensate	14.72	$62.68

Yet the jury awarded $2,438.75.

The Sun Fresh defendants own the surface of a two acre tract, but do not own any mineral rights. Surface ownership, however includes the right to the use of the reservoir underlying the two acres for storage purposes. This was the right expropriated in the Sun Fresh case and it is the value of that storage right which is primarily at issue in the Sun Fresh case. Again the only expert evidence before the jury as to the value of the storage right was presented by Southern Natural. Again defendants presented no expert opinion evidence. The uncontradicted testimony established that the value of the storage right was $295 per acre, a $10 per acre increase because of inflation from the value testified to in Poland by the same expert. Yet the jury awarded $3,500 per acre, or a total of $7,000.

(2) The trial judge who had determined values in the Poland cases ordered a remittitur to which defendants would not agree.

This placed plaintiff in the peculiar position of having to oppose a new trial because of the practical and economic necessity of expediting completion of the storage facilities in and atop the reservoir underlying 13,000 acres when, relatively speaking, the dollar amount and the acreage in Sun Fresh/Sutton was small. Fortunately, the legislature has provided for such a situation and has allowed a devolutive appeal, even after an expropriator pays or deposits the amount of the judgment as the law requires in order for the expropriator to take possession of the property right expropriated. A suspensive appeal is not allowed in these expropriation cases to either litigant. See LRS 19:12, CC Art. 2634, Columbia Gulf Transmission Co. v. C. J. Grayson, Inc., 232 So.2d 150 (La.

App. 2d Cir. 1970).

(3) Defendants perfected their appeals and plaintiff answered each appeal without having to perfect its appeal, but seeking by the answer to reduce the amounts awarded defendants. Defendants' contentions on appeal have been answered in Poland. The trial court here correctly refused to accept defendants' appraiser as an expert witness for the purpose of estimating the value of the storage right. See Poland, supra.

Plaintiff contends on appeal that the judgments based on the jury verdicts are maiifestly erroneous and unsupported by any evidence and that attorney fees and costs should not have been assessed against plaintiff under the circumstances. We agree with plaintiff's contentions except as to the assessments of costs. Again see our discussion of LRS 19:12 and Louisiana Gas Purchasing Corp. v. Sincox, 368 So.2d 816 (La.App. 2d Cir. 1979), in Poland, supra.

In Department of Highways v. Wall, 32 So.2d 718, (La.App. 2d Cir. 1947), the State exercised its power of expropriation for a highway right of way across one acre in a rural area of Ouachita Parish. The only expert opinion evidence was presented by the State. The defendant did introduce deeds of improved land in the vicinity of the acre which apparently recited a consideration much higher than the value testified to by the State's expert appraisers. The court said the deeds were of little or no value. A jury awarded more than three times the average of the expert appraisers' estimate of value. This court observed:

> "There certainly is no testimony whatever in the record to warrant the valuation fixed by the jury. All things considered, we are of the opinion that the valuation fixed by the tow experienced realtors is fair and should be accepted as determinative of the question." 32 So.2d at p.719.

The court's comments on the law and procedures regarding expropriation are appropriate in the circumstances of this record.

> "The reason for referring to a jury ... the question of the value of real estate taken for public purposes is well known to all, and in a case where the proof submitted on the question of value is conflicting, the jury's fixation of value should not be disturbed unless it is manifestly erroneous. But, in no event is the jury warranted in ignoring the testimony intorduced in the case and substituting therefor their own private ideas or opinions on the issue of value. * * *
>
> "Courts have the inherent power to review jury's award of damages for property taken for public purposes, and to correct obvious errors ..." ibid.

These principles have not changed. The recently adopted Constitution expressly coninues our responsibility of reviewing facts

as well as law. LSA-Const. Art. 5, §10. Legislative enactments in the expropriation scheme since 1947 have limited somewhat our jurisdictional authority, but where we have jurisdiction, the constitutional scope of review continues as before. Compare LSA-Const. Art. 1, § 4, and LRS 30:22. More recent cases have stated the principle. See State Dept. of Highways v. Entre Nous, Inc., 283 So.2d 291 (La. App. 4th Cir. 1973).

(4) To relate the circumstances of this case to the quoted principles, we observe that the deed of the Enterprise sale has no weight in determining the value of the Sun Fresh-Sutton property rights and that defendants offered no estimate of the value of those rights. We observe that even the owner of property may testify in an expropriation action as to his estimate of the value of his own land if he has owned it for some time and knows of sales of land in his neighborhood. See State v. Barbe, 209 La. 185, 24

So.2d 372, 374 (1946). Deeds of property other than the property in question are not "comparable" simply because they involve adjacent or abutting property, or property put to a similar use. The comparable sales method of ascertaining market value is merely a technique used by the expert appraiser which is much approved by the courts in determining value. The appraiser gathers record evidence of sales of other property, verifies them, makes comparisons, selects those that are the most comparable toa the property whose value is in question, and from this technique, offers his opinion or estimate as to the market value of the property in question. See Dakin and Klein (1970), p. 181.

(5) The issue to be determined is not what other similarly situated or comparable property sold for, but is what is the estimated market value of the particular property or property right in question.

(6) Here there was no estimate of market

value of the property rights in question other than the estimate of the appraisers testifying for Sourthern Natural. Where there are conflicting estimates on the question of value, this court upholds the trier of fact (judge or jury) unless the determination of value is demonstrated to be obviously erroneous (to use the Wall terminology) or manifestly erroneous. See Poland, supra, Wall, supra.

Accordingly, the judgment in each case will be amended to reduce the amounts awarded, to delete the award of attorney fees, and to cast plaintiff with costs.

The awards to the Sutton defendants are reduced to these amounts:

Mrs Sutton, separate property right: $10.55

Sutton community property right: $62.68

The award to the Sun Fresh defendants is reduced to $590.00

Plaintiff is cast with costs here and below. As above amended, judgment in each appeal is affirmed.

END OF DOCKET